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Supreme Court of the United States

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ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

ROBERT BRAUNEIS
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6138

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments.[1] *Amici* have a particular interest in preserving the ability of States and local governments to remedy identified racial discrimination in their jurisdictions through a wide variety of constitutional means.

Amici's members are directly involved both in designing and administering affirmative action programs at the state and local level, and in administering federally-funded affirmative action programs such as the program challenged in this case. The elaboration of realistically attainable constitutional standards for affirmative action programs is crucial to those missions.

In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (*"Adarand I"*), this Court assured governments that carefully crafted and substantiated affirmative action programs could meet constitutional requirements. The design of and support for the challenged DBE program represents the best efforts of Congress and the Department of Transportation to address constitutional concerns. The resulting program does not violate petitioner's equal protection rights, but rather, in remedying the injuries of victims of discrimination, vindicates the equal protection rights of all.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authorized in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Adarand I*, this Court assured governments that strict scrutiny of affirmative action programs is not necessarily "'fatal in fact.'" *Adarand I*, 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). The challenged DBE program survives this endurable strict scrutiny, because it is squarely directed at the compelling governmental interest of remedying identified private and public discrimination and their effects in the federal contracting market, and is narrowly tailored to avoid burdening nonminorities with any unnecessary use of race-conscious measures.

A. The DBE program furthers the compelling state interest of remedying identified public and private discrimination. Although petitioners challenge the federal government's use of affirmative action to remedy purely private discrimination, this Court should take this opportunity to reaffirm in unmistakable terms that evidence of identified purely private discrimination can support affirmative action. Both the directly applicable precedents of this Court and the spending power and equal protection principles it has enunciated lead to the conclusion that the Constitution does not ban the use of affirmative action programs to redress injuries caused by identified private discrimination.

The evidence of unremedied discrimination in contracting markets amassed by the federal government is more than sufficient to establish a compelling need for affirmative action. Importantly, under the current design of the DBE program, program recipients must continue to gather evidence of local market discrimination, and to set DBE participation goals based on that evidence. Thus, the strength of the federal govern-ment's ample pre-enactment evidence is bolstered by local, ongoing factfinding efforts, and the scope of the remedy is adjusted in accordance with those findings.

Petitioner has no basis in law or logic for its argument that Congress had to find evidence of discrimination in a majority of States before enacting a nationwide affirmative action program. The cases petitioner cites in support of this novel requirement all concern the abrogation of state sovereign immunity, the preemption of state law, or the direct regulation of traditionally state-regulated private behavior. Although *amici* and its members would have a particular cause for concern if the DBE program implicated any of those interests, the program is in fact a federal spending measure that in no way intrudes on state prerogatives. Congress had sufficent pre-enactment evidence of widespread discrimination, and that evidence is supplemented by the ongoing factfinding man-dated by the DBE program.

B. The DBE program is a narrowly tailored response to the unremedied discriminatory injuries that Congress found in public contracting markets. All affirmative action programs are based on the recognition that, given the long history of racial discrimination in this country, there are grave injuries caused by discrimination that would remain unremedied if governments had to rely exclusively on race-neutral antidiscrimination laws. Thus, although affirmative action programs may end up calling upon "innocent persons . . . to bear some of the burden of the remedy," *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281 (1986) (plurality opinion), exclusive reliance on race-neutral measures will leave other innocent persons—the individual victims of discrimination—to bear the full, concentrated weight of their injuries. Constitutional standards for narrow tailoring must take into account the realization that affirmative action programs will never do perfect justice, but that controlled, imperfect justice is better than none at all.

The DBE program meets all realistically attainable standards of narrow tailoring. Congress spent twenty-five years trying a variety of race-neutral means for remedying

discrimination in contracting markets before concluding that an affirmative action program was required. The current version of the program requires ongoing efforts by each program recipient to use race-neutral means to meet minority participation goals, and the federal government remains actively involved in improving the variety and effectiveness of other race-neutral measures for promoting equality in contracting markets.

The DBE program also meets the narrow tailoring requirements of avoiding undue burdens on innocent nonminorities and ensuring that race-conscious measures are used only so long as needed. The program does not disrupt any settled expectations, but merely distributes a limited number of future opportunities to contract, leaving other such opportunities untouched. It does not use rigid quotas, but is instead based on capped subsidies and aspirational goals that are set by program recipients to reflect the underutilization of "ready, willing, and able" minority contractors in local markets. If minority participation goals are achievable by race-neutral means, the program requires the discontinuation of race-based subsidies. Thus, the DBE program complies with all realistically attainable standards for narrow tailoring, and should be upheld as a valid effort to further the compelling governmental interest in remedying identified racial discrimination.

ARGUMENT

THIS COURT SHOULD FULFILL ITS *ADARAND I* PROMISE THAT STRICT SCRUTINY IS NOT FATAL IN FACT BY AFFIRMING THAT THE CHALLENGED DBE PROGRAM MEETS ATTAINABLE CONSTITUTIONAL STANDARDS

In 1995, this Court held that the Constitution requires strict scrutiny of all programs employing racial classifications, whether sponsored by federal, state, or local governments, and whether favoring minorities or nonminorities. *See Adarand*

Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("*Adarand I*"). A majority of the Court, however, assured governments that strict scrutiny is not "'fatal in fact'" for narrowly tailored race-conscious programs that address "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)); *see id.* at 243 n. 1 (Stevens, J., dissenting); *id.* at 268 (Souter, J., dissenting); *id.* at 275 (Ginsburg, J., dissenting).

In reliance on that assurance, governments on all levels have striven to follow this Court's guidance in designing constitutional affirmative action programs to remedy grave and otherwise unremediable injuries caused by racial discrimination. In its current version, the challenged DBE program, like many other programs nationwide, contains comprehensive efforts to meet and exceed the standards of strict scrutiny articulated in *Adarand I* and in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). This case provides the Court the opportunity to fulfill its *Adarand I* promise by upholding a carefully substantiated and crafted affirmative action program while continuing to elaborate achievable constitutional standards to guide federal, state, and local governments.

As detailed below, the DBE program seeks to eradicate past and present identified discrimination by both public and private entities, objectives that are compelling interests under a proper reading of this Court's precedents. The program is based on and designed to require strong evidence of such discrimination. Both the program's general design and a number of its specific components ensure that it will not unduly burden innocent minorities, unnecessarily use race-conscious means, or last longer than do the injuries it was designed to remedy.

If the DBE program is nonetheless adjudged to fall short of the constitutional threshold, it will be hard to avoid the conclusion that the threshold is out of the reach of any government, and that strict scrutiny is in fact invariably fatal to real-world affirmative action programs. If that is the case, *amici* and their members have a strong interest in a plain statement to that effect, so that they do not continue to toil at devising constitutional affirmative action programs. Under *amici*'s reading of this Court's precedents, however, the goal of constitutional affirmative action remains attainable, and the DBE program is one such successful effort.

A. The DBE Program Is Supported By The Compelling Interest Of Remedying Identified Public and Private Discrimination

The first question on which this Court granted certiorari is "[w]hether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination." *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1598 (2001) (amending order granting petition for writ of certiorari). In deciding whether Congress had a compelling interest, the Court of Appeals properly divided its consideration into definitional and evidentiary stages. It asked, first, whether Congress's "articulated goal in enacting the race-based measures at issue in this case is appropriately considered a 'compelling interest.'" Pet. App. 24a. It then inquired "whether the actual evidence proffered by the government support[ed] the existence of [the] past and present discrimination" at which the challenged statute aimed. Pet. App. 28a. After careful analysis at both stages, it concluded that the DBE program was supported by a valid, well-substantiated compelling interest.

Petitioner challenges the Court of Appeals' conclusions at each stage. First, it mounts two attacks at the definitional stage. It argues both that there should never be any

compelling interest in race-conscious affirmative action programs, Pet. Br. 18-23, and that this Court's precedents define a "passive participant" requirement for engaging in affirmative action that should have led the lower court to reject all proffered evidence of purely private discrimination. *Id.* at 29 n. 21. Second, petitioner marshals a variety of arguments in an attempt to undermine the Court of Appeals' favorable assessment of the voluminous evidence proffered by the federal government. As *amici* demonstrate in the following two sections, petitioner's challenges fail at each stage.

1. Governments Have A Compelling Interest In Remedying Identified Private Discrimination, As Well As Identified Public Discrimination, Through Affirmative Action Programs

Amici will not address petitioner's first definitional challenge to the lower court's compelling interest analysis, which advocates a "colorblind" interpretation of equal protection that is well known to this Court and that has been rejected by a majority of the Court on many occasions. *Amici* do, however, squarely reject petitioner's assertion that this Court's precedents support a "passive participation" test that prevents governments from using affirmative action programs to remedy purely private discrimination.

This issue is important to *amici* because it has been a source of widespread confusion and error in the lower courts, including the Court of Appeals in this case. Although petitioner faults the Court of Appeals for not applying a "passive participant" requirement to exclude individual items of evidence of wholly private discrimination, the Court of Appeals in fact briefly reasoned that such a requirement had been satisfied, because it believed that this Court's precedents might support such a requirement. *See* Pet. App. 32a-33a.

While the court below ultimately concluded that this Court had not definitively addressed the issue, *see id.* at 32a, a

number of other circuits have erroneously concluded that private discrimination in which government is in no way involved cannot be remedied by means of affirmative action. *See, e.g., Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) ("[t]he municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a 'passive participant'"); *Hopwood v. Texas*, 78 F.3d 932, 950 (5th Cir.) ("the state's use of remedial racial classifications is limited to the harm caused by a specific state actor"), *cert. denied*, 518 U.S. 1033 (1996).

These cases conflict with decisions from other circuit courts that come to the opposite conclusion, and that, *amici* submit, are correctly decided. *See, e.g., Associated Gen. Contractors Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1413 n.10 (9th Cir. 1991) (stating that the opinions in *Croson* "appear[] implicitly to overrule our requirement . . . that to justify a race-based preference, 'the state or local government must be acting to remedy government-imposed discrimination'") (citations omitted), *cert. denied,* 503 U.S. 985 (1992); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (stating that affirmative action programs need not "be confined solely to the redress of state-sponsored discriminination"); *Tennessee Asphalt Co. v. Farris,* 942 F.2d 969, 974 (6th Cir. 1991) ("Governmental entities are not restricted to eradicating the effects only of their own discriminatory acts"). This Court should take the opportunity afforded by this case to end lower court confusion and reiterate in unmistakable terms that purely private identified discrimination may support narrowly tailored race-conscious governmental remedies.

a. In *Croson*, a majority of this Court concluded that governments have a compelling interest in remedying private discrimination within their jurisdictions (as well as prior

public discrimination) by means of race-conscious programs. *See* 488 U.S. at 492 (plurality opinion) (the City of Richmond "can use its spending powers to remedy private discrimination"); *id.* at 509 ("[i]f the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion"); *id.* at 538 (Marshall, J., dissenting) ("the interest in ensuring that the government does not reflect and reinforce prior private discrimination . . . is . . . compelling").

As the *Croson* plurality explained, this holding was not a departure from this Court's precedents, but entirely consistent with it. In particular, the *Croson* plurality demonstrated that a superficially inconsistent statement by the plurality in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), turned out on closer inspection to support the *Croson* holding. *See* 488 U.S. at 492. The *Wygant* plurality concluded that on the facts of that case, the "Equal Protection Clause required 'some showing of prior discrimination by the governmental unit involved.'" *Id.* (quoting 476 U.S. at 274) (plurality opinion)). Yet the layoff program at issue in *Wygant* dealt only with the internal employment policies of the Jackson Board of Education, and the plurality's statement was tailored to those facts. *See id.*

This Court's precedents demonstrate that, whereas general "societal discrimination" cannot support affirmative action programs, "identified discrimination" can support such programs, and "identified discrimination" may be public, private, or any combination of the two. Two passages, one in *Wygant* and the other in *Croson,* deserve particularly close examination, for they are the most likely sources of confusion, yet upon proper consideration provide crucial support for this conclusion.

First, in her opinion in *Wygant*, Justice O'Connor expressed her agreement with the *Wygant* plurality "that a governmental agency's interest in remedying 'societal' discrimination, *that is, discrimination not traceable to its own actions*, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) (emphasis added). To the casual reader, this comment may suggest that this Court recognizes only two types of discrimination—discrimination "traceable to [a government's] own actions" and "societal" discrimination—and that any discrimination that is not traceable to a government's own actions is mere societal discrimination, which cannot be addressed by race-conscious remedies.

The *Croson* plurality's elucidation of the potentially misleading language in the *Wygant* plurality opinion, however, applies with equal force to this passage. Since the *Wygant* Court was reviewing an internal employment policy of the Jackson Board of Education in light of lower court findings that "any statistical disparities [in the employment of minority teachers] were the result of general societal discrimination, not of prior discrimination by the Board," *Wygant*, 476 U.S. at 278 (plurality opinion), neither the plurality nor Justice O'Connor had any occasion to consider whether, or to assume that, the categories of "societal discrimination" and "discrimination traceable to the government's own actions" were exhaustive, and the *Croson* plurality confirms that they are not.

Rather, as the *Croson* plurality explains, the critical dichotomy is that between "'*societal discrimination*' which is an inadequate basis for race-conscious classifications, and the type of *identified discrimination* that can support and define the scope of race-based relief." *Croson*, 488 U.S. at 497 (plurality opinion) (emphasis added). In turn, "identified discrimination" can be either public or private, so long as there is evidence that renders it sufficiently distinct from the general history of discrimination within our society. *See id.* at 486 (explicitly rejecting Croson's argument that "the city must

limit race-based remedial efforts to eradicating the effects of its own discrimination").

The second likely source of confusion is the *Croson* plurality's counterfactual statement that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.* at 492. A cramped reading of this statement would be that "passive participation" was not merely sufficient to support affirmative action, but *necessary*, and that the "passive participation" requirement was satisfied only by contemporaneous support of discriminatory private actors.

Such a reading, however, is belied by the consistent formulation, in a portion of the *Croson* opinion joined by a majority and hence constituting the Court's holding, of the burden upon the City of Richmond to show only "identified discrimination in the Richmond construction industry," *id.* at 500, 505, not the City's own contemporaneous support of that discrimination.[2] If a market continues to be distorted by the effects of identified past private discrimination at the time a government enters that market, then surely at the time of entry the government becomes a "passive participant" in the perpetuation of those discriminatory effects, and can therefore craft a narrowly tailored program to remedy them. Thus, as *Croson* concludes, governments "may take remedial action when they possess evidence that their own spending practices

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[2] *See Croson*, 488 U.S. at 500 (rejecting proffered evidence as being "of little probative value in establishing identified discrimination in the Richmond construction industry"); *id.* at 505 ("none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry"); *see also id.* at 500 (concluding that there was insufficient evidence of discrimination "by *anyone* in the Richmond construction industry").

are exacerbating a pattern of *prior discrimination*, . . . public *or private*. . . ." *Id.* at 504 (emphasis added).

b. The conclusion that a government may use race-conscious measures to remedy purely private discrimination also fits perfectly within the broader spectrum of government interests and constitutional concerns identified by the Court. This Court has recognized repeatedly that governments have an interest of the highest order in enacting regulatory measures to eliminate private discrimination. *See, e.g., Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945). This Court has recognized, as noted above, that governments may formulate voluntary affirmative action programs to remedy their own past discrimination. *See, e.g., Wygant*, 476 U.S. at 274 (a "showing of prior discrimination by the governmental unit involved" may be sufficient to support "limited use of racial classifications in order to remedy such discrimination") (plurality opinion); *id.* at 286 (O'Connor, J., concurring).

Yet, in important respects, affirmative action programs to remedy private discrimination are on a stronger constitutional footing than either regulation of discriminatory private conduct or affirmative action targeted at a government's own past discrimination. First, affirmative action programs are an exercise of a government's spending power, rather than its regulatory power. Thus, such programs always seek not only to combat private discrimination, but to ensure that the government's own spending decisions are not supporting subtle forms of discrimination or perpetuating the effects of past discrimination. This Court has recognized that a government has unusually wide latitude to promote its interests when it is not acting in a regulatory capacity but is, for example, "expend[ing] only its own funds in entering into construction contracts for public projects." *White v. Massachusetts Council*

of Constr. Employers, 460 U.S. 204, 214-15 (1983); *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) ("the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake"); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding viewpoint-discriminatory limitations on speech as conditions of government funding); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

When, as in adopting an affirmative action program, government is attempting to avoid supporting private racial discrimination and its effects, the government's spending power is at its zenith. As the *Croson* plurality put it, "[i]t is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492.

Second, affirmative action programs targeted at private discrimination are less likely to burden innocent nonminorities than programs targeted at a government's own prior discrimination. The burden that affirmative action programs place on innocent nonminorities has consistently been central to this Court's constitutional calculus. *See, e.g., United States v. Paradise*, 480 U.S. 149, 182 (1987) (plurality opinion) (inquiring whether the challenged provisions "impose[d] an unacceptable burden on innocent third parties"); *Wygant*, 476 U.S. at 276 (plurality opinion) (expressing a concern about "discriminatory *legal* remedies that work against innocent people") (emphasis omitted); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978) (opinion of Powell, J.) (race-based remedial benefit programs "usually remai[n] subject to continuing oversight to assure that [they] will work the least harm possible to other innocent persons competing for the benefit").

If government discrimination forms the entire basis for a program, nonminority individuals who are burdened by the program must be presumed to be innocent of any discriminatory conduct (though, importantly, they may still have benefitted from the government's discrimination). By contrast, evidence of private discrimination may show that individuals burdened by an affirmative action program may likely have actually participated in causing the injuries that the program seeks to remedy. Thus, programs predicated on private discrimination are less likely to burden innocent third parties than programs directed entirely at public discrimination.

In sum, affirmative action programs targeting private discrimination raise less serious constitutional concerns than affirmative action programs targeting public discrimination. Since the latter are unquestionably constitutional, the constitutionality of remedying private discrimination with affirmative action would seem to follow *a fortiori*.[3] Yet many courts have neither accepted this logic nor found adequate guidance in this Court's direct statements on the issue. The Court should take this opportunity to put the issue to rest by stating clearly that affirmative action programs may constitutionally target purely private discrimination.

[3] Allowing governments to remedy private discrimination does give rise to the remote possibility that more than one level of government with jurisdiction over the same territory might devise a program to remedy the same discriminatory conduct, potentially resulting in overremediation. But that danger can be addressed by requiring governments with overlapping jurisdiction to take account of each other's efforts to remedy such discrimination. To tie the hands of all governments in advance because of the mere possibility that more than one of them might reach out to remedy a grave social problem is surely to overreact to a potential need for coordination.

2. *The DBE Program Is Supported By And Designed To Require Strong Evidence Of Identified Discrimination In Relevant Contracting Markets*

The evidence proffered by the federal government to support the DBE program is wide-ranging and voluminous, and *amici* cannot engage in a type-by-type, study-by-study, hearing-by-hearing rebuttal of petitioner's scattershot challenges. However, *amici* do wish to advance two particular arguments in support of the Court of Appeals' determination that Congress had adequate evidence of identified discrimination to enact the DBE Program.

First, the DBE program's design intentionally and responsibly defers a portion of the potential evidentiary burden on Congress to post-enactment stages. Legislatures often incorporate individualized inquiries and procedures into affirmative action program design, or delegate authority to administrative agencies to incorporate such inquiries and procedures and to fine-tune a program in other respects. In this instance, the DBE program incorporates a variety of important individualized inquiries and procedures. One particularly significant example is a requirement that each government agency that receives program funding set its own goal for DBE participation by examining local market data. *See* 49 C.F.R. § 26.45 (2000); Pet. App. 67a-68a (discussing local goal-setting requirement).[4] That local goal must reflect "the availability of ready, willing and able DBEs relative to all

[4] Other individualized inquiries incorporated into the DBE program include a provision allowing individual nonminorities to demonstrate that they qualify for DBE status, *see* 49 C.F.R. § 26.67(d) (2000); a provision making available proceedings to rebut presumptions of minority qualification in individual cases, *see id.* § 26.67(b); and a requirement that each individual applicant for DBE certification "submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged." *Id.* § 26.67(a).

businesses ready, willing and able to participate" in local projects funded under the DBE program. 49 C.F.R. § 26.45(b). Thus, the DBE program incorporates exactly the type of inquiry contemplated by *Croson*, which indicates that remedial efforts might be justified when there is "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors." *Croson*, 488 U.S. at 509 (plurality opinion).

Of course, individualized inquiries and procedures such as local goal-setting greatly aid an affirmative action program to meet the constitutional requirement of narrow tailoring, as discussed in more detail below. But under a proper analysis, they should also lessen the government's burden of producing general evidence to support the program.[5] If, for example, Congress were to enact a rigid, nationwide quota for minority participation in federal contracting, it would have a heavy burden to demonstrate that discrimination against minority contractors was uniform across the country, and that absent such discrimination minority contractors in each local market would have been awarded at least that percentage of awarded

[5] The reason why the "compelling interest" and "narrow tailoring" analyses are not entirely distinct is straightforward. It is often convenient to refer to the purpose of a law by means of a summary verbal formula, and then ask whether a legislature had evidence to support a need for that effort as summarily formulated. A more complete description of a law's purpose, however, usually must take into account the detailed ways in which the law in fact defines its beneficiaries and confers benefits upon them. Here, although one might concisely summarize the DBE program's purpose as "remedying identified discrimination in highway contracting," another somewhat more illuminating abridgement is "remedying such identified discrimination as *may be* found by local recipients in their goal-setting inquiries." The evidence needed to justify such ongoing inquiries is surely different than the evidence needed to justify a sweeping advance conclusion.

contracts equal to the legislated quota. *Cf. Croson*, 488 U.S. at 499-500 (reviewing five findings advanced in support of Richmond's fixed 30% quota, and concluding that they did not provide the city with "'a strong basis in evidence for its conclusion that remedial action was necessary'") (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). By contrast, when a program requires minority participation goals to be set at a local level based on ongoing factfinding, as does the current DBE program, the initial factfinding process is relieved of some of the burden of supporting the program.

To be sure, the government must still present strong initial evidence of past or present discrimination against minorities that hinder them in competing in the industries supported by government contracting programs. In this case, however, Congress has done that, and at the same time has wisely allocated some of the factfinding for, and tailoring of, the program to post-enactment processes.

Second, petitioners erroneously contend that the government must show discrimination in highway contracting "in at least a majority of states." Pet. Br. 33. This proposed requirement is without legal or factual basis. As an initial matter, the cases that petitioner cites in support of a state-by-state requirement are irrelevant to the exercise of the federal government spending power at issue here. Those cases all concern the abrogation of state sovereign immunity, the preemption of state law, or the direct regulation of traditionally state-regulated private non-economic behavior. *See* Pet. Br. 33; *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (abrogation of state sovereign immunity under the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (direct regulation of private non-economic behavior under the Violence Against Women Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (abrogation of state sovereign immunity under the Age Discrimination in Employment Act); *Florida Prepaid Post-*

secondary Ed. Exp. Bd. v. College Savings Bank, 527 U.S. 627 (1999) (abrogation of state sovereign immunity under the Patent and Plant Variety Protection Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (preemption of state law under the Religious Freedom Restoration Act of 1993).

As associations of state and local government officials, *amici* would have serious concerns about any exercise of federal power that encroached on state prerogatives. Yet the federal law at issue here does nothing of the sort. The MBE program leaves state sovereign immunity intact; leaves state and local laws untouched; and leaves traditionally state-regulated private behavior free of novel federal penalty. As noted above, the MBE program is an exercise of the spending power, and seeks only to ensure that monies drawn from federal coffers do not perpetuate identified racial discrimination or its effects. Because the MBE program does not encroach on any state interest, the cases cited by petitioner do not support a requirement of state-by-state findings.

Moreover, even if these cases had some relevance here, none of them supports petitioner's curious formulation of its own rigid quota, namely that Congress must find discrimination in more than twenty-five States. This Court has never formulated a majority head-count rule to decide issues of federal legislative power concering the States, and there is no reason for it to formulate one to determine federal power with regard to individuals seeking federal funds. Of course, an isolated finding of discrimination in a market at one end of the continent provides little support for a remedial program at the other end. Petitioners do not allege, however, that the voluminous evidence compiled by Congress was confined to a particular region. And it is worth repeating that the DBE program's incorporation of local goal-setting by individual recipients, *see* 49 C.F.R. § 26.45 (2000), guarantees that Congress's initial factfinding will be supplemented by local

market factfinding before any individual nonminority contractor is burdened by an award of a contract to a certified DBE. Thus, petitioner's arguments challenging the distribution of supporting evidence among the States lack both legal and factual support.

B. The DBE Program is Narrowly Tailored To Remedy Identified Discrimination

Both the design of the DBE program and its legislative history demonstrate that the program is narrowly drawn to remedy otherwise unremediable injuries caused by identified discrimination. Thus, the second question on which this Court granted certiorari—whether the "current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest," *Adarand v. Mineta*, 121 S. Ct. at 1598 (amending order granting petition for writ of certiorari)—must be answered in the affirmative. Before specifically considering program elements and legislative context, however, it is worth recalling what "narrow tailoring" must mean in the context of affirmative action, and how that meaning is tied to the constitutional goal of equal protection.

Affirmative action programs do not render perfect justice. Minorities benefitted by an affirmative action program were not necessarily suffering from past or present discrimination in exactly the same degree as the program turns out to benefit them. Nonminorities burdened by an affirmative action program have not necessarily either practiced discrimination or benefitted from discrimination in exactly the same degree as the program turns out to burden them. In the face of this manifest imperfection, it is important to articulate why a majority of this Court has consistently concluded that the "narrow tailoring" requirement leaves room for well-crafted affirmative action—why, that is, that "as part of this Nation's dedication to eradicating racial discrimination, innocent

persons may be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 280-81 (plurality opinion). The critical concern implicit in this conclusion is not a concern for groups, but for individuals—the individual victims of racial discrimination.

All plausibly constitutional affirmative action programs are predicated on strong evidence of identified, unremedied, and otherwise unremediable discriminatory injuries to individuals. The existence of such individual injuries is the key to understanding the justice and constitutionality of affirmative action. If this Court categorically rejects affirmative action, it leaves the individual victims of discrimination to suffer the full harm of their injuries with no hope that justice will ever be done. Thus, the judgment that narrowly tailored affirmative action programs are not just consistent with, but indeed promote, the guarantee of equal protection, is grounded on the recognition that controlled imperfect justice is better than no justice at all.

To be sure, poorly formulated and inadequately substantiated affirmative action programs may "impose the entire burden of achieving racial equality on particular [nonminority] individuals, often resulting in serious disruption of their lives," *Wygant*, 476 U.S. at 283, and thus cannot be held consistent with the Constitution's guarantee of equal protection. Yet a complete ban on affirmative action in the face of identified discrimination is certain to "impose the entire burden of achieving racial equality on particular individuals," namely, the individual minority victims of discrimination. The resulting disruption to their lives is no rarer or less. The Constitution should not be read to shackle governments seeking to lift part of that burden.

This articulation of the rationale for affirmative action programs underlies this Court's promise in *Adarand I* that strict scrutiny is not fatal to affirmative action. The promise is made to governments, but its ultimate beneficiaries are the

individual victims of discrimination. The care of those individuals, entrusted by the Constitution to this Court and those governments, is the ultimate issue in this case. This Court can and should discharge that trust by finding that the DBE program meets realistically attainable standards of narrow tailoring, including standards requiring the consideration of alternative race-neutral remedies, prohibiting undue burdening of nonminorities, and mandating durational limits on the use of affirmative action.

1. Both the supporting evidence for and ongoing implementation of the DBE Program exhibit ample "'consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Adarand I*, 515 U.S. at 237-38 (quoting *Croson*, 488 U.S. at 507). In *Adarand I*, this Court commented on an apparent lack of judicial inquiry into whether there had been such consideration. *See id.* On remand, the United States presented extensive evidence of Congress's efforts to remedy the problem with race-neutral means over a twenty-five year period before it first enacted an affirmative action program for federal contracting in 1978. *See* Pet. App. 194a-195a (opinion of district court). These ultimately unsuccessful efforts included anti-discrimination legislation, executive action to remedy employment discrimination in federal contracting, race-neutral contracting preferences for socially and economically disadvantaged businesses, and federal support of sureties that issue bonds to small businesses. *See id.* The district court found that this quarter-century-long effort sufficiently demonstrated consideration of race-neutral means. *See id.* at 196a.

Petitioner did not challenge this finding in the Court of Appeals, *see* Pet. App. 57a, and petitioner's unsupported assertion in its brief in this Court that Congress did not try race-neutral alternatives, *see* Pet. Br. 46, ignores both the district court's finding and petitioner's failure to challenge it.

Nor have Congressional efforts to use race-neutral means abated. Congress has continued to legislate to strengthen antidiscrimination law and its enforcement. For example, in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), Congress amended 42 U.S.C. § 1981 to remove the limiting construction of this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that the statute's prohibition on discrimination in contracting did not apply to conduct occurring after contract formation. *See* Civil Rights Act of 1991 § 101, 105 Stat. at 1071-72; *see also id.* §§ 110, 111, 102 Stat. at 1078 (expanding technical assistance, training, education, and outreach efforts). Current materials published by the Small Business Administration reveal a wealth of continued and augmented efforts to provide race-neutral aid to small businesses seeking to enter the federal contracting market. *See, e.g.*, U.S. Small Business Administration, *Washington D.C. Small Business Resource Guide* (2001 edition) 28-29 (describing the SBA's Surety Bond Program, Prime Contracts Program, Subcontracting Assistance Program, Certificate of Competency Program, and Size Determination Program).

The mandate to prefer race-neutral remedies is also extended by the DBE Program to program recipients, which are required to use race-neutral means to the maximum extent possible in meeting their local market goals for minority participation. *See* 49 C.F.R. § 26.51 (2000). These race-neutral means include redesigning and simplifying the bidding process to facilitate increased participation by small businesses, *see id.* § 26.51(b); assisting small businesses in obtaining bonding and financing, *see id.* § 26.51(b)(2); providing advice and support regarding management, accounting, and business development, *see id.* §§ 26.51(b)(5), 26.51(b)(6); and establishing programs to assist new firms, "particularly in fields" with "historically . . . low" minority participation. *See id.* § 26.51(b)(7). To the extent that race-neutral measures are successful in pursuing local market goals, administering

authorities must cease use of race-based contract subsidies and goals. *See id.* § 26.51(f).

Thus, the DBE program design requires ongoing efforts to consider and implement race-neutral means of encouraging minority participation. A recent General Accounting Office report found that surveyed DBE program recipients were able to achieve, on average, one-third of their program goals for fiscal year 2000 through the use of race-neutral means. *See* U.S. General Accounting Office, Report to Congressional Committees, *Disadvantaged Business Enterprises: Critical Information Is Needed To Understand Program Impact*, Pet. Br. App. 22 (June 2001). Although the consideration of race-neutral alternatives is often thought of as a pre-enactment legislative activity, such ongoing efforts by local authorities to reduce reliance on race-based contractual provisions are an even better means of ensuring that the injuries redressed by affirmative action programs are unremediable by any other means.

2. The DBE program prominently features a number of elements that ensure that it "does not unnecessarily trammel the interests" of nonminority contractors. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Most importantly, the advantages the DBE program distributes—future opportunities to obtain government contracts—are not the subject of settled expectations by individuals who do not receive them. Thus, they are more like hiring goals, which "impose a diffuse burden, often foreclosing only one of several opportunities," than layoff plans, which "often result[] in serious disruption of [workers'] lives." *Wygant*, 476 U.S. at 283 (plurality opinion). In addition, the program does not rely on inflexible quotas that bar nonminorities from competing for a certain percentage of contracts. Rather, it pursues aspirational goals by means of a capped subsidy that limits the relative disadvantage that can be visited upon nonminorities and circumscribes the financial

incentive to hire DBEs. *See* Pet. App. 70a (discussing the structure of the subsidy caps).

3. Finally, there is little danger that the use of race-based preferences under the DBE program "'will . . . last longer than the discriminatory effects [they are] designed to eliminate.'" *Adarand I*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). As noted above, DBE program design assures that, as federal contracting participation by ready, willing, and able DBEs approaches their proportionate availability in local markets, the use of race-based participation incentives will cease. *See* 49 C.F.R. § 26.45(b) (2000) (detailing how local participation goals are to be set); *id.* § 26.45(f) (phasing out race-based contract goals as they cease to be needed to meet participation goals). Congress has also demonstrated its commitment to ongoing review of the need for and efficacy of the DBE program. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §1101(b)(6), 112 Stat. 107, 114-15 (1998) (requiring the Comptroller General to prepare and present to Congress within three years a comprehensive report on the DBE program). Thus, the DBE program contains ample safeguards assuring that the use of race-based remedies will be discontinued when no longer necessary.

In sum, Congress and the Department of Transportation have designed the DBE program to respond specifically to the abundantly evident problem of identified discrimination in federal contracting markets. They have incorporated a wide variety of safeguards to address the concerns enunciated by this Court in its affirmative action cases, most particularly its pronouncements in *Croson* and *Adarand I*. If the standards set forth in these cases are realistically attainable, then the current DBE program meets them. Thus, this Court should uphold the DBE program, and thereby allow governments to continue to use carefully designed and substantiated affirmative action programs to address the otherwise unremediable injuries suffered by victims of discrimination.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT BRAUNEIS
720 20th Street, N.W.
Washington, D.C. 20052
(202) 994-6138

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

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* *Counsel of Record for the* Amici Curiae